SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 16 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1029

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA and PHILADELPHIA HOUSING AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners,

—v.—

UNITED STATES OF AMERICA and PHILADELPHIA HOUSING AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 18, 1967.

Citation to Opinions Below

The opinion of the Eastern District of Pennsylvania denying petitioners' motion for a stay of the treble damage actions is printed in Appendix C hereto and is reported at 269 F. Supp. 540. The opinion of the Western District of

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* American Radiator & Standard Sanitary Corporation, Kohler Co., Crane Co., Wallace-Murray Corporation, Universal-Rundle Corporation, Rheem Manufacturing Company, Borg-Warner Corporation, Briggs Manufacturing Company, Plumbing Fixture Manufacturers Association, John B. Balmer, Gerber Plumbing Fixtures Corp., Ogden Corporation, Mansfield Sanitary, Inc., Peerless Pottery, Inc., Kilgore Ceramics Corporation, Lawndale Industries, Inc. and Georgia Sanitary Pottery, Inc.

Pennsylvania granting an injunction to petitioners is printed in Appendix B hereto and is reported at 272 F. Supp. 691. The opinion of the Court of Appeals, which reversed the judgment of the District Court for the Western District of Pennsylvania, is printed in Appendix A hereto and is not yet reported in the official reports but has been reported at 1967 Trade Cas. ¶ 72,311 (3d Cir. Dec. 18, 1967).

Jurisdiction

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on December 18, 1967. The Court of Appeals stayed its mandate for 30 days on January 3, 1968 but refused to stay proceedings in the Eastern District of Pennsylvania. On January 11, 1968, Mr. Justice Brennan denied petitioners' application for a stay of proceedings in the Eastern District of Pennsylvania pending the filing of a petition for a writ of certiorari and a final determination thereon by this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Questions Presented

1. Is it an abuse of discretion for a federal district court, in order to insure a fair criminal trial, to enjoin concurrent discovery proceedings against the criminal defendants in related, subsequently filed, private civil litigation pending in another federal court which had refused to stay such proceedings?

2. Is a federal criminal court powerless to enjoin concurrent discovery proceedings in related civil litigations in another federal court when the defendants have not yet

sought review by peremptory writ of the civil court's denial of a stay, but after the civil court refused to certify its ruling for interlocutory appeal?

Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions involved are the self-incrimination and due process clauses of the fifth amendment to the United States Constitution and the right to counsel clause of the sixth amendment to the United States Constitution. The statute giving the District Court power to issue the injunction is 28 U.S.C. § 1651(a). The rules giving the District Court discretion to enter the injunction are Rules 2 and 57(b) of the Federal Rules of Criminal Procedure. These provisions are printed in Appendix D hereto.

Statement

Petitioners are an individual, corporations and a trade association which have been indicted in the United States District Court for the Western District of Pennsylvania ("Pittsburgh") upon charges of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.* The two indictments were filed October 6, 1966, and all the defendants have pleaded not guilty.**

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* Petitioners have been informed that the remaining individuals indicted in Pittsburgh intend to file a separate petition for a writ of certiorari.

** On the same day the United States instituted a civil action in the Pittsburgh court seeking injunctive relief against the corporate and trade association defendants named in one of the indictments and making virtually identical allegations of illegality. This action has been stayed by order of the Pittsburgh court with the Government's consent.

A. The Philadelphia Civil Actions.

Some two and one-half months after the indictments, the Philadelphia Housing Authority and Lindy Bros. Builders, Inc. of Philadelphia, purporting to represent classes,* filed civil treble-damage actions in the United States District Court for the Eastern District of Pennsylvania ("Philadelphia") pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, against the indicted corporations and trade association ("the civil defendants") alleging, in virtually verbatim language, the same violations of law earlier charged in the Pittsburgh indictments. In January and February 1967 these plaintiffs served extensive interrogatories and a motion for production of a vast quantity of documents which sought information directly relating to the acts alleged in the indictments.

On March 28, 1967, the civil defendants moved in the Eastern District of Pennsylvania for a stay of proceedings in the Philadelphia actions pending the disposition of the criminal cases. This motion was denied by Hon. John W. Lord, Jr. on June 7, 1967, 269 F. Supp. 540. On June 15, 1967, Judge Lord denied the civil defendants' request for certification of an interlocutory appeal pursuant to 28

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* At present, some 475 plaintiffs have already intervened, or moved to intervene, in the Philadelphia civil actions.

In addition to the Philadelphia civil actions, similar actions have been commenced against some or all of the corporations and the trade association in the United States District Courts for the Northern District of California, the District of Columbia and the Western District of Pennsylvania. All pretrial discovery in those cases has either been deferred by agreement of counsel pending final disposition of the instant proceeding or has not yet been instituted.

U.S.C. § 1292(b).* The civil defendants' subsequent request for a protective order barring discovery pending this Court's decision in *Simon* v. *Wharton,* No. 72 October Term 1967, *cert. granted,* 386 U.S. 1030, was also denied.

B. The Pittsburgh Proceedings.

On June 30, 1967, petitioners moved before Hon. Louis Rosenberg, the judge assigned to preside over the Pittsburgh criminal actions, for an injunction barring the Philadelphia plaintiffs from requiring the civil defendants to plead to the Philadelphia complaints or respond to the interrogatories and document production motion. Judge Lord, at Judge Rosenberg's request, thereupon extended the time within which the civil defendants were required to act in the Philadelphia actions, stating that Judge Rosenberg should decide the matter in his own discretion.

On July 28, 1967, Judge Rosenberg found that an injunction was necessary (1) to preserve the constitutional rights of the criminal defendants; (2) to prevent the Government's obtaining an unfair advantage from premature and one-sided disclosure of their positions and defenses during the course of civil discovery; and (3) to insure the fair and orderly administration of the criminal cases. On the other hand, he found that no prejudice to the private plaintiffs would result from the reasonable delay in the prosecution of their damage claims occasioned by the injunction. Accordingly, Judge Rosenberg issued an injunction for 60

* On June 19, 1967, Hon. Alfonzo J. Zirpoli denied without prejudice a motion to stay the treble-damage actions pending in the Northern District of California, stating that the proper forum for relief was the Pittsburgh court in which the criminal cases are pending. (Transcript of Proceedings, June 19, 1967, *Eastland Construction Co.* v. *American Radiator & Standard Sanitary Corp.,* No. 46162 (N.D. Calif.) at p. 15.)

days, unless further extended by order of the Court, prohibiting the private plaintiffs from requiring answers to their complaints or any responses to the pending interrogatories and document production motion; the court also enjoined the criminal defendants from taking any such action or from testifying in any depositions in the Philadelphia actions.

C. Proceedings in the Court of Appeals.

On August 3, 1967, respondent Philadelphia Housing Authority*, acting on behalf of all the Philadelphia plaintiffs, appealed from Judge Rosenberg's injunction. The civil defendants thereupon, on August 18, petitioned the Court of Appeals for a writ of mandamus or prohibition to review Judge Lord's denial of a stay in the Philadelphia civil cases "in order that [the Court of Appeals] might have before it all of the issues necessary for a proper determination of the matter and for the granting of such relief as is required under the circumstances." The Court of Appeals denied this petition without hearing or opinion, but "without prejudice," on September 13, 1967 at a time when the Pittsburgh injunction was in effect.

On September 26, 1967, when Judge Rosenberg's 60-day injunction was about to expire, the Court of Appeals stayed all proceedings in the Philadelphia actions until its determination of the appeal from the injunction and its further order, except that the civil defendants were required to answer the complaints, which they have done.

The Court of Appeals reversed the order of the Pittsburgh District Court and set the injunction aside on Decem-

* Respondent United States took no position in either the Pittsburgh District Court or the Court of Appeals.

ber 18, 1967. Judge William H. Hastie's opinion avoided reaching the merits of the civil defendants' claims to prejudice in their defense of the criminal charges. Rather, it set the injunction aside on the procedural ground that those petitioners (the indicted corporations and trade association) should have sought "an appeal from the court [Philadelphia] which has first acted on the matter or an application to the reviewing court for a peremptory writ, not resort to another coordinate tribunal [Pittsburgh]." (A-3) With respect to the indicted individuals, the Court of Appeals ruled that their rights could be adequately protected on an *ad hoc* basis by the Philadelphia court in which the civil cases are pending. On January 3, 1968, the Court of Appeals stayed the issuance of its mandate,* but denied petitioners' motion for a stay of the Philadelphia civil proceedings pending the filing of a petition for certiorari and this Court's disposition thereof.

In the meantime, consonant with the Court of Appeals" decision, on December 29, 1967, the civil defendants renewed their mandamus petition (previously denied "without prejudice") seeking review of Judge Lord's denial of a stay. This renewal was, on January 8, 1968, summarily denied, again without hearing or opinion. The civil defendants intend promptly to file with this Court a petition for certiorari to review this ruling so that all of the relevant procedures, records and issues may be before this Court.

The Philadelphia plaintiffs having moved on January 5, 1968 for sanctions, claiming that the civil defendants had defaulted on discovery despite the prior injunction, peti-

* The stay of mandate had no effect inasmuch as the Pittsburgh court's injunction, effective for 60 days, had long since expired.

tioners applied to Mr. Justice Brennan on January 9, 1968 for a stay of the Philadelphia proceedings pending review in this Court. Mr. Justice Brennan denied that application for a stay on January 11, 1968.

Reasons for Granting the Writ

This petition raises substantial and important questions concerning the administration of criminal justice in the federal courts. This Court has not passed upon the rights of criminal defendants to be protected from simultaneous discovery proceedings in parallel private civil actions; upon the power or obligation of a federal criminal court to afford such protection to defendants within its jurisdiction; or upon the proper pre-trial and appellate procedures by which such protection should be accorded. The questions here involved embrace those raised in *United States* v. *Simon*, 262 F. Supp. 64 (S.D.N.Y. 1966), *rev'd*, 373 F.2d 649 (2d Cir. 1967), in which this Court granted certiorari, *sub nom. Simon* v. *Wharton*, 386 U.S. 1030 (1967). Subsequent mootness prevented this Court from passing upon these questions in *Simon*.* Review of those questions is no less appropriate in this case.

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* On December 18, 1967, upon consideration of the parties' joint motion, this Court vacated the judgments below and remanded the case with instructions to dismiss it as moot. 36 U.S.L.W. 3252 (U.S. Dec. 18, 1967). The matter was mooted by the start of the criminal trial and the settlement of the civil action.

To avoid the possibility that these questions similarly might be mooted in the instant case by the commencement of the criminal trial, petitioners will undertake, if this petition is granted, to file immediately motions pursuant to this Court's Rules 41(4) and 43(4) for an advancement of argument and an abridgement of the time for filing briefs on the merits so that these questions may be determined during this term.

I

Petitioners' rights to due process and a fair trial of the criminal charges against them are seriously jeopardized by the spectre of broad civil discovery in private actions involving the identical allegations of illegality. The threat posed by such concurrent proceedings has several facets, all of which were either rejected or ignored by the Court of Appeals.

First, civil discovery prior to the criminal trial would necessarily compel disclosure of the defendants' positions and defenses and thus afford the Government a preview of defendants' case not contemplated by the Federal Rules of Criminal Procedure. Since criminal defendants do not have access to comparable discovery from the Government, the federal criminal courts in both the instant case and *Simon* correctly held that an unfair and prejudicial advantage to the Government would thereby result.

As in *Simon,* where the criminal defendants had declared their intention not to rely upon their privilege against self-incrimination, this element of unfairness transcends the Fifth Amendment privilege. The corporate petitioners here, not having a privilege against self-incrimination, are in the same posture as the *Simon* defendants who were unwilling to invoke it. In light of the hundreds of intervenor-plaintiffs presently prosecuting the Philadelphia actions, any disclosures made in the course of civil discovery are certain to affect the trial of the criminal cases. Adequate safeguards against the unfair use of such information could not be provided by protective orders such as

those contemplated by the Court of Appeals.* The unfairness inherent in such a state of affairs is apparent; and corporate criminal defendants, just as accused individuals, are entitled to due process.

In addition, unlike the situation in *Simon*, civil discovery prior to the criminal trial impairs effective exercise of the individual defendants' Fifth Amendment privilege against self-incrimination. It has long been recognized that failure scrupulously to uphold the privilege in proceedings collateral to a criminal prosecution can destroy it.** Since the individual defendants are present or former employees of the corporate petitioners, civil discovery during the pendency of the criminal cases necessarily spawns a host of Fifth Amendment problems. For example, what are the discovery obligations of the corporate petitioners, as civil defendants, to seek information from the accused individuals, presumably the most knowledgeable parties? To what extent, if at all, must the accused individuals cooperate with the corporations in making discovery on matters as to which the individuals would prefer to remain silent pending trial? On the other hand, what would be the effect

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* That the Court of Appeals was mistaken in assuming that adequate protection will be provided by the civil district court is evidenced by Judge Lord's denial, on July 12, 1967, of a motion by petitioner, Wallace-Murray Corporation (whose president and chief executive officer, John B. Balmer, is one of the indicted individuals) seeking relief from the obligation to respond to so much of the requested discovery as concerns the specific criminal charges, as distinguished from background and economic facts. The Court of Appeals denied a petition for a writ of mandamus seeking review of Judge Lord's order on September 13, 1967.

** "[I]f the privilege is to be effective at all it must be given a comprehensive application, and thus must prevent compulsory self-incrimination in *any* proceeding." GRISWOLD, THE 5TH AMENDMENT TODAY 55 (1955).

on the individuals' constitutional rights if the corporations respond to discovery requests by providing information with respect to the individuals' activities against their wishes? In short, how could discovery be meaningful, accurate or complete without impairing the individuals' Fifth Amendment rights? Furthermore, with the pendency of the criminal cases, any exercise of the Fifth Amendment privilege, were it to receive publicity, could well be prejudicial in itself. So also, all defendants could be injured by public disclosures resulting from civil discovery.

The simultaneous prosecution of the criminal cases and civil discovery would also place an unnecessary and oppressive burden on both the criminal and civil courts. The impact of each item of civil discovery upon the criminal trial and the rights of the criminal defendants, the manner in which it should be handled, the scope, nature and degree of disclosure, and like problems are the proper concern not only of the civil court but of the criminal court as well, which "must take such steps by rule and regulation that will protect [its] processes from prejudicial outside interferences." *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966); *see also, Estes* v. *Texas*, 381 U.S. 532 (1965). These questions, which transcend the normal functioning of the Federal Rules of Civil Procedure, would require pioneer rulings every step of the way by the courts with responsibility for both the civil and criminal cases.

Moreover, the burden of active, simultaneous preparation and defense of the criminal and civil cases imperils the defendants' rights to fundamental fairness and the effective assistance of counsel. The harassment inherent in requiring defendants to wage a two-front war is self-

evident. Since no discovery could be made in the civil cases without having to evaluate its impact on the criminal defense, the same counsel must know and function in order to protect the defendants' rights in both cases. And they must participate as advocates in fashioning the pioneer rulings which will be necessitated. This burden, substantial as it is for the corporate defendants, simply cannot be sustained by the individuals, a number of whom are no longer employed by the corporate defendants and most of whom have retained separate counsel.

The foregoing burdens and problems, in addition, run counter to the statutory scheme embodied in Section 5 of the Clayton Act, 15 U.S.C. §§ 16(a), 16(b), which provides prospective civil plaintiffs with incentives to abide the result of government litigation. The clear congressional plan is that, if the Government is the initiator of action aimed at vindicating the public interest, private parties should await the disclosures and outcome of the government suit.

The Court of Appeals, considering the individual defendants' contentions, brushed aside the problems, the burdens and the statutory scheme. With respect to civil discovery against their corporate employers impairing their Fifth Amendment privilege and disadvantaging them at trial, the Court held:

> "[W]e know of no rule or equitable principle that protects a defendant in a pending criminal prosecution from the disclosure, by another person in a separate civil action, of evidence which may later become part of the prosecution's case against him." (A-5)

Moreover, the Court of Appeals ignored the controlling considerations in reconciling discovery in concurrent civil

and criminal litigation as aptly stated by the Fifth Circuit in *Campbell* v. *Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963):

> "In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. . . . Separate policies and objectives support these different rules.
>
> " . . . Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. . . ." (307 F.2d at 487)* (A-6 n.1)

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* The district courts have also held that civil discovery should not ordinarily go forward against the prosecution or defendant in a criminal case when both cases involve the same issues. *United States* v. *$2,437.00 United States Currency*, 36 F.R.D. 257 (E.D.N.Y. 1964); *United States* v. *Steffes*, 35 F.R.D. 24 (D. Mont. 1964); *United States* v. *Maine Lobstermen's Ass'n*, 22 F.R.D. 199 (D. Me. 1958); *United States* v. *Linen Supply Institute of Greater New York*, 18 F.R.D. 452 (S.D.N.Y. 1955); *United States* v. *Bridges*, 86 F.Supp. 931 (N.D. Cal. 1949); *United States* v. *A. B. Dick Co.*, 7 F.R.D. 442 (N.D. Ohio 1947); *Zara Contracting Co.* v. *New York*, 22 App. Div. 2d 415, 256 N.Y.S. 2d 98 (3d Dept. 1965); *Perry* v. *McGuire*, 36 F.R.D. 272 (S.D.N.Y. 1964); *Paul Harrigan & Sons, Inc.* v. *Enterprise Animal Oil Co., Inc.*, 14 F.R.D. 333 (E.D. Pa. 1953); *National Discount Corp.* v. *Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952); *see also, Texaco, Inc.* v. *Borda*, 383 F.2d 607 (3d Cir. 1967) (therein the court below affirmed a stay of virtually all civil proceedings pending disposition of related criminal proceedings); *cf. United States* v. *Parrott*, 248 F.Supp. 196 (D.D.C. 1965); *but see, Hiss* v. *Chambers*, 8 F.R.D. 480 (D. Md. 1948).

Although the Fifth Circuit did not have before it an injunction issued by the District Court, its views of the governing principles find no reflection in the Third Circuit's decision which failed even to consider the merits of the corporate petitioners' claims of prejudice. Judge Hastie unsuccessfully attempted to distinguish *Campbell* by stating that the instant case "is quite unlike the situation in which a party to a criminal prosecution is demanding discovery in a civil suit as a means of obtaining advance disclosure of what the other side will be able to prove in the criminal case. Contrast Campbell v. Eastland, 5th Cir. 1962, 307 F.2d 478." (A-6 n.1) Petitioners respectfully submit that, just because the shoe is on the other foot the principles do not differ; accordingly, the Court of Appeals' decision conflicts with that of the Fifth Circuit.

Here, without any showing of prejudice to the private plaintiffs, the Court of Appeals placed a higher value on immediate prosecution of their damage claims than on preserving the integrity of the criminal trial and avoiding the manifest burdens and complications of concurrent proceedings. The need for this Court to enunciate the standards and principles governing the administration of these difficult problems is plain.* See Note, *Concurrent Civil and Criminal Proceedings,* 67 Colum. L. Rev. 1277, 1294 (1967).

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* The instant case and *Simon* v. *Wharton, supra,* are illustrative of the myriad situations in which the threat to the fair administration of federal criminal justice posed by concurrent criminal and civil actions can arise. Not only may virtually every crime give rise to common-law civil liability, but Congress has specifically accorded a concomitant right to civil damages in numerous federal criminal statutes. *E.g.,* 15 U.S.C. §§ 78ff, 77k (Securities); 18 U.S.C. § 1001, 15 U.S.C. § 1120 (fraudulent trademark registrations).

II

In holding that the criminal court was powerless to enjoin discovery proceedings against the civil defendants, the Court of Appeals conflicts with the decision of the Second Circuit in *United States* v. *Simon*, 373 F. 2d 649 (2d Cir. 1966), *rev'g*, 262 F. Supp. 64 (S.D.N.Y. 1967), *cert. granted*, 386 U.S. 1030 (1967), *vacated as moot*, 36 U.S.L.W. 3252 (U.S. Dec. 18, 1967).

The Third Circuit held that the appropriate procedure was "an appeal from the court which has first acted on the matter or an application to the reviewing court for a peremptory writ, not resort to another coordinate tribunal." (A-3) In so ruling, the Court of Appeals made no mention of these crucial facts: (1) the civil defendants initially sought direct interlocutory appeal from Judge Lord's denial of a stay and were refused the requisite certification, direct appeal under 28 U.S.C. § 1292(a) being unavailable (see *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955); *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966)); (2) the Third Circuit's receptivity to mandamus as an appropriate remedy to review the grant or denial of a stay was in doubt and not clarified until the later decision in *Texaco, Inc.* v. *Borda*, 383 F. 2d 607 (3d Cir. 1967), on July 17, 1967;* (3) this Court's grant of certiorari in *Simon* v. *Wharton*, effectively continuing an injunction issued by the criminal court after

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* *Borda* demonstrates an uneven-sense of justice in the Third Circuit's ruling in the instant case. In *Borda* it upheld a district court's stay in a private antitrust action of discovery proceedings against corporate defendants, most of which were under indictment, against a mandamus attack by a non-indicted defendant. On the contrary, here the Court of Appeals' action disavows a stay.

it was empowered to do so by Mr. Justice Harlan's order, suggested that such a procedure was appropriate; (4) Judge Zirpoli, in the California civil cases, had suggested that the Pittsburgh criminal court was the proper forum in which to seek relief; (5) Judge Lord indicated that the procedure adopted was not unacceptable to him, postponing proceedings to permit Judge Rosenberg to rule and stating that the criminal court should decide the matter in its own discretion; and (6) after an appeal from the Pittsburgh criminal court injunction was taken, the civil defendants sought mandamus to provide the Court of Appeals with the opportunity to rule on all the prior procedures. Instead, the Third Circuit summarily denied the mandamus petition (and a subsequent renewal thereof), and then reversed the injunction holding, inexplicably, that mandamus should have been sought.

The Third Circuit's rigid approach to a noval procedural problem is in sharp contrast to that of the Second Circuit in *Simon*. There, the civil plaintiff noticed the deposition of an indicted individual not a party to the civil action. The accused moved in the civil case for a protective order. Upon denial of that motion, his appeal to the Second Circuit was dismissed summarily without opinion, presumably because the order was not appealable except by peremptory writ. The witness, and the other criminal defendants, thereupon sought and were granted an injunction by the criminal court sitting in another district. On appeal from the injunction, the Second Circuit reviewed the merits, specifically assumed the criminal court's power to issue the injunction and in no way suggested that a failure to seek mandamus from the civil court's denial of relief made the criminal injunction improper.

What the Third Circuit presumably has said is that (a) it will review the grant or denial of a stay in a civil case by peremptory writ (although it has declined twice to do so here) and (b) that because the district judges presiding over criminal cases in the Circuit may not enjoin concurrent civil proceedings before such review, they can never do so since the Court of Appeals will have resolved the matter before they are at liberty to act. It shifts from the court having jurisdiction of the criminal case to the court handling the civil case the paramount responsibility of insuring a fair criminal trial. The enunciation of this unpredictable procedure has been invoked to deprive the corporate petitioners of consideration of the merits of their claims to imminent infringement of their substantial rights to due process and a fair criminal trial. This ruling, directly contrary to the procedure accepted by the Second Circuit in *Simon*, should be reviewed by this Court to clarify the respective roles of the federal civil, criminal and appellate tribunals in protecting the substantial rights of criminal defendants against the threat of civil discovery.

III

Due process requires fundamental fairness. *In re Murchison*, 349 U.S. 133 (1955). And the fair application of the Criminal Rules is the obligation of the district courts. *McNabb* v. *United States*, 318 U.S. 332 (1943). As this Court held in *Estes* v. *Texas*, 381 U.S. 532 (1965), where the probability of prejudice to the accused is inherent in the circumstances, it is not necessary to find identifiable prejudice in order to conclude that due process is wanting.

The Pittsburgh district court, finding a "duty . . . to protect the accused in a criminal case," (B-23) reviewed all of the relevant facts and carefully weighed the likelihood of substantial injury to the integrity and fairness of the criminal cases against any conceivable prejudice to the civil plaintiffs by a reasonable delay in the prosecution of their damage claims. Judge Rosenberg concluded that the scales weighed overwhelmingly in petitioners' favor:

> "[W]hile recognizing that the plaintiffs are entitled to speedy availability of discovery processes of persons and records, the delay by the granting of a preliminary injunction will not unduly cause the plaintiffs irreparable harm against the possible irreparable harm to the defendants. In fact, by a speedier disposition of the criminal actions now pending before me, the plaintiffs are likely to acquire greater benefits from records divulged in the criminal proceedings under 15 U.S.C. § 16(a) . . . . I can see no prejudicial results to the plaintiffs while here protecting the fundamental rights of the defendants in the pending criminal actions." (B-20-1, 22)

This ruling reflects the proper standard governing the harmonization of concurrent civil and criminal proceedings in the federal courts. Since the Court of Appeals has repudiated that standard, we submit that this Court in the exercise of its supervisory powers over the federal judiciary should grant certiorari to settle important questions in the administration of criminal justice.

CONCLUSION

The petition for certiorari should be granted.

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